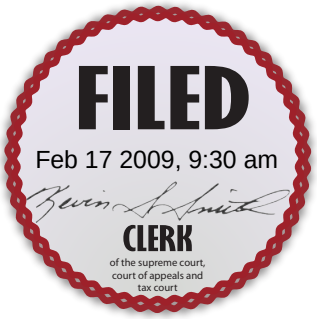

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IN THE
COURT OF APPEALS OF INDIANA

ROGER D. HOLBROOK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0810-PC-480
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James D. Humphrey, Judge
Cause No. 15C01-0712-PC-2

February 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Roger Holbrook was convicted of Murder and Invasion of Privacy following a jury trial. On direct appeal, this court affirmed his murder conviction, but remanded to the trial court with instructions to vacate the invasion of privacy conviction and for resentencing. See Holbrook v. State, No. 15A01-0405-CR-213 (Ind. Ct. App. August 9, 2005) ("Holbrook I"). Holbrook subsequently petitioned for post-conviction relief, which the post-conviction court denied. He now appeals, challenging the post-conviction court's judgment, and he raises the following issues for our review:

1. Whether he was denied the effective assistance of trial counsel.

2. Whether he was denied the effective assistance of appellate counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

In Holbrook I, we set out the facts and procedural history as follows:

> On October 8, 2002, the Dearborn Superior Court issued an ex parte order for protection on behalf of Barbara Holbrook ("Barbara") and against Holbrook, Barbara's ex-husband. The order enjoined Holbrook from threatening to commit or committing acts of violence against Barbara, prohibited Holbrook from harassing, annoying, telephoning, contacting or communicating with Barbara, and ordered Holbrook to stay away from Barbara's residence and place of employment. A hearing on the protective order was scheduled for November 6, 2002.
>
> On November 5, 2002, Barbara was living on some property in rural Dearborn County. Barbara lived in a trailer on the property. Shortly before 8:00 a.m. on November 5, 2002, Leslie Tully, Barbara's landlady, heard several gunshots. Also on November 5, 2002, Michael White and Steve Hartman were driving near Tully's property when they observed a gold-colored vehicle driving toward Tully's property. Shortly thereafter, White and Hartman arrived at a barn located near the property rented by Barbara. White and Hartman heard several gunshots coming from Barbara's rental property shortly before 8:00 a.m. Soon thereafter, White and Hartman

observed the gold-colored vehicle speeding out of Barbara's driveway. Hartman recognized and identified Holbrook as the driver of the gold-colored vehicle.

Around 9:00 a.m. on November 5, 2002, approximately one hour after she heard the gunshots, Tully received a telephone call from Holbrook. Holbrook told Tully that he loved her and he was going away.

At approximately 11:00 a.m. on November 5, 2002, Eric Hurst was delivering straw to Barbara when he saw lights on in the barn. When he did not find Barbara in the barn, Hurst went to see if she was in her camper. Hurst then saw Barbara's body lying on the ground, and he notified local law enforcement.

An autopsy revealed that Barbara suffered multiple gunshot wounds and died from those to her heart and lungs. The pathologist recovered bullets from Barbara's body and turned them over to law enforcement. The pathologist determined that Barbara was killed on November 5, 2002, and that given the condition of her body and environmental factors, the time of her death could have been at 8:00 a.m.

The State issued a warrant for Holbrook's arrest and charged Holbrook with murder, stalking, and invasion of privacy. Holbrook eluded capture for several months until he was apprehended in Tennessee. The State commenced its trial of Holbrook on March 1, 2004. During the trial, Mary Margaret Enriquez, a former girlfriend of Holbrook, testified that Holbrook drove a gold-colored Ford Contour during the month of October of 2002. Enriquez also testified that she observed a Glock[] .45-caliber handgun in the Ford Contour. Enriquez further testified that some time in late October of 2002, Holbrook took her to an abandoned farm in Kentucky owned by Holbrook's family. While at the Kentucky farm, Enriquez saw Holbrook shooting targets with the Glock. Finally, Enriquez testified that Holbrook had told her that he wanted to kill Barbara.

June Ruth Hebrank, another of Holbrook's girlfriends, testified that in October and November of 2002, she observed Holbrook with a Glock handgun and that he always kept it with him. Hebrank also testified that when she last saw Holbrook in November of 2002, he was driving a gold-colored rental car. Hebrank testified that she saw Holbrook the afternoon of November 4, 2002, when Holbrook was staying at Hebrank's residence in West Virginia. When Hebrank returned home from work at approximately 12:30 a.m. on November 5, 2002, Holbrook, his gold-colored rental car, and the Glock were gone. Holbrook telephoned Hebrank shortly after 12:30 a.m. on November 5, 2002, and told her that he was in

Cincinnati. Holbrook again telephoned Hebrank around 11:00 a.m. on November 5, 2002, and he informed Hebrank that he had killed Barbara. During trial, the State presented a handgun permit for the sale of a Glock .45-caliber, model 21, handgun to Holbrook on October 18, 2002. Holbrook's Glock, however, was never found.

Garland Barry Bridges, a detective with the Dearborn Sheriff's office, testified that he recovered six shell casings from the Holbrook farm in Kentucky and several shell casings from the scene of Barbara's murder. The State then presented the testimony of Mark A. Keisler, a firearms examiner with the Indiana State Police since October of 1995. Keisler testified at length about his experience and background. His training included a fourteen-month internship and attendance at schools sponsored by the Association of Firearms and Tool Mark Examiners and the International Association for Identification. Keisler testified that he is a distinguished member of the Association of Firearms and Tool Mark Examiners and the International Association for Identification. He further testified that he has had thirteen papers related to his field published. The State presented Keisler's curriculum vitae, showing that he has examined over five thousand items of evidence from over six hundred cases, and made over two thousand comparisons, one thousand identifications, and four hundred exclusions. Keisler proceeded to explain that a casing[] can be identified as having been fired from a particular firearm and the process used to determine whether a casing has been fired from a particular firearm. Keisler opined that "since firearms are manmade . . . the[re] are not two firearms that are alike . . . they have their own distinct signature." (Tr. 842). Keisler agreed that he is able to test casings to determine whether they were fired from the same firearm. Keisler testified that, based on his examination, he believed that the same Glock .45-caliber, model 21, handgun discharged the casings collected at the murder scene and those collected on the Holbrook farm in Kentucky.

On March 11, 2004, a jury found Holbrook guilty of murder and invasion of privacy. On April 1, 2004, the trial court sentenced Holbrook to an aggravated sentence of sixty-five years for murder,[] and the presumptive sentence of one year for invasion of privacy,[] with the sentences to be served concurrently. The trial court found the following aggravating circumstances: (1) the nature and circumstances of the crime; (2) the need for correctional or rehabilitative treatment best provided by commitment to a penal facility; and (3) the violation of a protective order. The trial court did not find Holbrook's prior criminal history, consisting of two convictions for operating a motor vehicle while intoxicated, a sufficient aggravating circumstance.

On appeal, this court affirmed Holbrook's murder conviction, but remanded with instructions to the trial court to vacate his invasion of privacy conviction and for resentencing. And the post-conviction court denied Holbrook's petition for post-conviction relief following a hearing. This appeal ensued.

DISCUSSION AND DECISION

The petitioner bears the burden of establishing his grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Harrison v. State, 707 N.E.2d 767, 773 (Ind. 1999), cert. denied, 529 U.S. 1088 (2000). To the extent the post-conviction court denied relief in the instant case, Holbrook appeals from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "'leads unerringly and unmistakably to a conclusion opposite to that reached by the [] court.'" See Williams v. State, 706 N.E.2d 149, 153 (Ind. 1999) (quoting Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993)), cert. denied, 529 U.S. 1113 (2000). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. Bivins v. State, 735 N.E.2d 1116, 1121 (Ind. 2000).

Issue One: Trial Counsel

Holbrook first contends that he was denied the effective assistance of trial counsel. There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a

defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied.

Deficient performance is representation that fell below an objective standard of reasonableness by the commission of errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Roberts v. State, 894 N.E.2d 1018, 1030 (Ind. Ct. App. 2008), trans. denied. Consequently, our inquiry focuses on counsel's actions while mindful that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render counsel's representation ineffective. Id. Even if a defendant establishes that his attorney's acts or omissions were outside the wide range of competent professional assistance, he must also establish that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. See Steele v. State, 536 N.E.2d 292, 293 (Ind. 1989).

On appeal, Holbrook asserts that his trial counsel was ineffective for not presenting evidence at trial to support the mitigation defense of sudden heat, which would have justified a voluntary manslaughter instruction. He contends that he did not admit his guilt to his attorneys before trial because he was not aware of all of the evidence against him. And he maintains that he "stopped denying guilt while there was still time to put on more evidence supporting voluntary manslaughter." Brief of Appellant at 13.

But the State presented evidence at the post-conviction hearing that Holbrook was aware of the evidence against him prior to trial. And one of Holbrook's attorneys, Robert Ewbank, testified at the post-conviction hearing that by the time Holbrook admitted to the shooting, opening the door for a sudden heat defense, "the trial was over[.]" PC-R Transcript at 20. Another of his trial attorneys, Gary Sorge, testified that Holbrook admitted to the shooting "[n]ear the very end of the trial[.]" Id. at 38. And David King, Holbrook's third trial attorney, explained why the defense team did not prepare a voluntary manslaughter defense:

> [By mid-trial,] we had no indication that Mr. Holbrook was wanting us to present that as a defense. Obviously as a strategy decision you're either going to go with one or the other, it's tough to argue to a jury that "I wasn't there, but if I was, this is what happened." Mr. Holbrook was adamant prior to trial that he was innocent, that he was not there, and that that was the defense that he wanted to present.

Id. at 31-32. Finally, both Ewbank and Sorge testified that a sudden heat defense would have been "difficult" to pursue given the number of shots fired, including one or two shots fired after Barbara was lying face down on the floor. Id. at 25. At the conclusion of trial, the defense team did request a jury instruction on voluntary manslaughter, but the trial court refused that request.

Given the evidence that Holbrook knew the evidence against him but did not admit to the shooting until the end of trial, and given his attorneys' explanations of their trial strategy, we cannot say that his attorneys' performances were deficient. And Holbrook does not direct us to any potential evidence to support having pursued a sudden heat defense in light of the evidence of murder. While he asserts that two witnesses could have testified that Holbrook's relationship with Barbara "was volatile from both

ends[,]" Brief of Appellant at 13, that is insufficient to show sudden heat. Our supreme court has held that words alone are not sufficient provocation to reduce murder to manslaughter, Potts v. State, 594 N.E.2d 438, 439 (Ind. 1992), cert. denied, 507 U.S. 1039 (1993), and Holbrook does not direct us to any evidence that Barbara provoked him with more than words. Evidence that he and Barbara generally had a volatile relationship, without more, is simply not enough to demonstrate that his attorneys' performances were deficient on this issue. The post-conviction court did not err when it concluded that Holbrook was not denied the effective assistance of trial counsel.

Issue Two: Appellate Counsel

Holbrook also contends that he was denied the effective assistance of appellate counsel. The standard of review for a claim of ineffective assistance of appellate counsel is essentially the same as for trial counsel in that the defendant must show that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. Hooker v. State, 799 N.E.2d 561, 570 (Ind. Ct. App. 2003), trans. denied.

> Ineffective assistance of appellate counsel claims generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. [Bieghler v. State, 690 N.E.2d 188, 193-94 (Ind. 1997)]. To show that counsel was deficient for failing to raise an issue on direct appeal, i.e., waiving the issue, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. [Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000)]. Our supreme court has adopted the following test to evaluate the performance prong of appellate counsel's performance: (1) whether the unraised issues are significant and obvious from the record; and (2) whether the unraised issues are "clearly stronger" than the raised issues. Bieghler, 690 N.E.2d at 194; Timberlake v. State, 753 N.E.2d 591, 606 (Ind. 2001), cert. denied, 537 U.S. 839 (2002). If that analysis demonstrates deficient performance by counsel, the court then examines whether "the issues which . . . appellate counsel failed to raise, would have been clearly more likely to

result in reversal or an order for a new trial." Bieghler, 690 N.E.2d at 194 (citation omitted). Further, the reviewing court must:

> . . . consider the totality of an attorney's performance to determine whether the client received constitutionally adequate assistance[,] . . . [and] should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

Bieghler, 690 N.E.2d at 194. Ineffectiveness is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal. Id. at 193 (citation omitted). One reason for this is that the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. Id.

Id. at 570-71.

Here, Holbrook's sole contention is that his appellate counsel was deficient in not raising the issue of whether the trial court abused its discretion when it refused to give a voluntary manslaughter instruction. But, as we have already addressed, the evidence at trial did not support giving that instruction. Indeed, on appeal, Holbrook does not direct us to any specific evidence of sudden heat at the time of the shooting. Further, at the post-conviction hearing, Holbrook's appellate counsel testified regarding her strategy as follows:

> [Jack] Kenny [of the Public Defender Council] and I were concerned [about asserting the voluntary manslaughter instruction issue on appeal] because it hadn't been raised directly at the trial court. The other concern was that the evidence had revealed that there were I believe a total of eight shots that were fired into the victim and that several of them had been fired while she was [lying] face down according to the forensic testimony at trial, and Mr. Kenny and I have reviewed a case together . . . I don't recall the case, but that Appellate Court case had something to the effect that six shots wouldn't be sudden heat, so we didn't feel that having eight or nine especially several of them in the victim's back would justify raising that on

> appeal, and that was discussed with Mr. Kenny on the 13th of January, 2005.

Post-Conviction Transcript at 11-12. Further, his appellate counsel testified that Holbrook approved of the strategic decision to forego this issue on appeal. The post-conviction court did not err when it concluded that Holbrook was not denied the effective assistance of appellate counsel.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.